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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

NO. ~~915~~ 47

JOSEPH CHARLES USNER

Petitioner

versus

LUCKENBACH OVERSEAS CORPORATION and ISTHMIAN LINES, INC.

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF ON BEHALF OF THE PETITIONER

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1969

NO. 675

JOSEPH CHARLES USNER

Petitioner

versus

LUCKENBACH OVERSEAS CORPORATION and ISTHMIAN LINES, INC.

Respondent

BRIEF ON BEHALF OF THE PETITIONER JOSEPH CHARLES USNER

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 413 F. 2d 984. The opinion of the Court of Appeals for the Fifth Circuit in *Grigsby, et al. v. Coastal Marine Service of Texas, Inc.. et al.*, incorporated in the Usner opinion by reference is reported in 412 F. 2d 1011.

JURISDICTION

The jurisdiction of this court is invoked pursuant to Title 28 Section 1254 (1) United States Code. The judgment of the Court of Appeals for the Fifth Circuit in *Luckenbach Overseas Corporation and Isthmian Lines, Inc. v. Joseph Charles Usner* was entered on July 3, 1969. Petition for the writ was timely filed, within 90 days from July 3, 1969, the date of the judgment.

QUESTIONS PRESENTED

(1) Did *Mascuilli v. the United States*, 387 U.S. 237, 87 S. Ct. 1705, abolish the defense of operational negligence in an action based on unseaworthiness?

(2) Does operational negligence at the moment of injury render the vessel unseaworthy?

(3) Has the Supreme Court rejected the distinction between operational negligence and unseaworthiness?

STATEMENT OF THE CASE

The essential facts of the case are not in dispute and present an incidence of operational negligence at the moment of injury.

On September 28, 1964, T. Smith & Sons, Inc., an independent contract stevedore was engaged in unloading cargo consisting of bundles of steel rods, approximately 50 feet in length, from a barge and loading the cargo into the No. 3 hatch of the S/S Edgar F. Luckenbach. The barge was moored along side the vessel; the port and starboard booms at the No. 3 hatch were being used to transfer the cargo from the barge to the vessel. Slings secured to booms, were being used to transport the bundles of rods from the barge into the vessel. The Stevedore's employees were using the port winch and boom at the No. 2 hatch to aid in the operation by "breaking out" the bundles preparatory to lifting them from the barge. Their function was simply to lift each bundle temporarily, so that slings could be placed on both ends of the rods. Once the slings were secured, the cargo gear at the No. 3 hatch was used to lift the bundle out of the barge and into the vessel.

On the day the petitioner was injured, he was working on the barge, securing the slings attached to the fall of the "breakout boom" around the cargo. The operation was conducted in this manner and without incident both prior to and subsequent to petitioner's accident. At approximately 2:30 p.m., the winch operator, operating the No. 2 port winch, lowered the breakout slings just above petitioner's head and beyond his reach. Petitioner motioned to the flagman, then standing on the deck of the vessel, to direct the winch operator to lower the sling; the flagman in turn signaled the winch operator. The winch operator lowered the breakout sling too quickly and too far. The breakout gear struck petitioner causing him to fall into the barge and sustain serious and permanent injuries.

On April 27, 1965, petitioner filed a suit against the respondent claiming benefits pursuant to the General Maritime Law. On July 31, 1967, the respondent filed a motion for summary judgment alleging that there was no genuine issue as to any material facts and asserting that on the basis of discovery depositions and affidavits all ship's gear functioned properly and that if the accident was caused by negligence, that negligence could only have been the instantaneous negligence of the longshoremen, which negligence did not render the vessel unseaworthy.

The motion for summary judgment was opposed by petitioner asserting that operational negligence as a defense had been obliterated by the Supreme Court of the United States in its per curiam in *Mascuilli v. the United States*, 387 U.S. 237, 87 S. Ct. 1705. Respondent's motion for summary judgment was denied.

Respondent then filed a motion for rehearing or in the alternative for leave to take an interlocutory appeal pursuant to Title 28 of the United States Code, Section 1292 (b).

On August 30, 1967, respondent was granted leave to file for interlocutory appeal for the reason that the motion for summary judgment involved a controlling question of law, to wit, "the validity of the doctrine of operational negligence as a defense to which there existed substantial ground for difference of opinion and for which an immediate appeal would materially advance the termination of the litigation."

On October 12, 1967, the respondents were granted leave to appeal from the interlocutory order by the United States Court of Appeals for the Fifth Circuit. The matter was argued on May 24, 1968, and on July 3, 1969, the United States Court of Appeals for the Fifth Circuit rendered a judgment remanding the matter and directing the District Court to enter the summary judgment.

ARGUMENT

The question of law presented herein is, did the United States Supreme Court in *Mascuilli v. the United States*, 387 U.S. 237, 87 S. Ct. 1705, abolish the time test which heretofore distinguished unseaworthiness from operational negligence at least within the circuits? Or stated another way — did the Supreme Court in *Mascuilli* abolish the defense of operational negligence or did it simply reaffirm its position in *Mahnich v. Southern S.S. Co.*, 321 U.S. 96 (1944) and *Crumady v. The J. H. Fisser*, 358 U.S. 423 (1959) neither of which establish a time test.

It is submitted that *Mascuilli*, as do *Mahnich* and *Crumady*, stands for the proposition that the misuse of proper equipment by a longshoreman resulting in injury to a co-worker renders the vessel unseaworthy without regard to an interval of time between the negligent act and the resulting condition of unseaworthiness. Neither *Mahnich* nor *Crumady* allude to a time interval but to a condition which exists when and where the work is to be done.

Counsel for petitioner submits that the Supreme Court in *Mascuilli* reaffirmed *Mahnich* and *Crumady*.

The time test, or the ripening of a condition of unseaworthiness over the passage of time, is a creature of the appellate courts. The Supreme Court has consistently held a vessel to be unseaworthy when an inquiry as to whether or not the condition complained of made the vessel unsafe and dangerous for the work at hand has been answered affirmatively.

Mascuilli is a classic example of operational negligence resulting in instant unseaworthiness. On an otherwise seaworthy ship, a tag line tender was killed during a loading operation aboard a government vessel by the negligence of his fellow employees, in their failure to operate the winches in unison, resulting in the creation of a tightline condition which caused a heavy shackle to part, recoil and inflict the mortal wounds, all in an instant.

The decedent's wife sued the vessel owner alleging the ship's first officer was negligent and the vessel was unseaworthy. This district court held that the vessel was at all times in a seaworthy condition, and that the

accident was caused by the failure of the longshoremen to comply with proper loading procedures. The trial court's summation of the cause of the accident was as follows:

> "In summary, the Court finds that the vessel and all its equipment was in a seaworthy condition at all times, and remained so throughout the entire loading operations. The accident was caused solely by the negligent operation of the stevedoring crew using seaworthy equipment in such a manner as to cause the accident to occur so instantaneously that the Third Officer was unable to warn anyone or to prevent its happening." *Mascuilli v. United States*, 241 F Supp. 354, (E.D. Pa. 1965).

The Court of Appeals for the Third Circuit affirmed per curiam, and held that the findings of fact and conclusions of law by the trial court were not clearly erroneous:

> "This case is before us for the second time. In our judgment, upon consideration of the whole record, including, *inter alia* appellant's thorough statement of her view of the question involved, the findings of fact by the Trial Court, that the vessel and its equipment were in a seaworthy condition at all times throughout the loading operation and that the accident was caused solely by the negligent operation of the stevedoring crew as stated in finding of fact #35, were not clearly erroneous." *Mascuilli v. United States*, 358 F. 2d 133 (3rd Cir. 1967).

This Honorable Court granted *certiorari* and summarily reversed citing *Mahnich v. Southern S.S. Co.*, 321 U.S. 96, 64 S. Ct. 455 (1944) and *Crumady v. The*

Joachim Hendrick Fisser 358 U.S. 423, 79 S. Ct. 445 (1959).

The Petitioner's Brief for Certiorari in *Mascuilli* posed three questions. As this Honorable Court reversed the two lower courts, it must have answered at least one of these questions in the affirmative.

Analysis of which of the three questions was answered affirmatively has led to different conclusions and has not resolved the conflict which existed in the circuits prior to *Mascuilli*. The confusion which has plagued both bench and bar and the entire maritime industry continues.

Though this Honorable Court did not render an opinion in *Mascuilli* an examination of *Mahnich* and *Crumady* leads to the determination that the second question was answered affirmatively.

Briefly the questions posed by the petitioner in *Mascuilli* were as follows:

(1) Did a prior unseaworthy condition come into play by the tightline condition?

(2) Did the negligent handling of proper equipment by the longshoremen create a dangerous condition rendering the vessel unseaworthy?

(3) Was the vessel unseaworthy because the longshoremen were "not equal in disposition and seamanship to the ordinary men in the calling," as was found in *Boudoin v. Lykes Brothers*, 348 U.S. 336 (1955)?

It is this writer's opinion that this Honorable Court's

affirmative answer to the second question solely prompted the reversal.

With respect to the first question, the trial court in effect distinguished *Crumady* on facts. In both *Mascuilli* and *Crumady* the automatic cut-off devices on the winches were set in excess of safety requirements. However, in *Mascuilli*, the two winches involved in the tightline condition could not possibly trip; the after port winch was in paying out position #1 and the forward starboard winch was in neutral. In neither of these positions would the safety devices on the winches trip. There was uncontroverted expert testimony by defendant's witnesses to the effect that when a tightline condition occurs involving a winch in the paying-out position and another winch in the neutral position, there is no known safety device in marine architecture and engineering that would or could have prevented the type of accident which actually occurred. (*Mascuilli*, 241 F. Supp. 354, F.F. #33 at p. 360-361). This in effect distinguishes *Crumady* since in that case the winch was paying in and the safety device could have tripped before the boom snapped had the cut-off device been properly set. The excess setting in *Mascuilli* albeit improper, and perhaps even a defective condition, had no causal connection with the accident since there was no known safety device which could have prevented it. The after starboard winch could not have prevented nor measured the pull along the tightline. There was no safety device to be adjusted for winches in those positions; therefore, when the shackle broke, it could only have been caused by the negligent use of proper equipment — *the petitioner's second question.*

The third question posed by petitioner must be an-

swered in the negative for several reasons. Had this Court intended to reverse on this point, it would have cited *Boudoin* as controlling, which it did not do.

Also, liability under the *Boudoin* decision is a question of degree, 348 U.S. 336, 339-340 (1955). It would seem clear that a single act of negligence by otherwise competent longshoremen would not require the conclusion that they were unequal in disposition and seamanship to the ordinary men of the calling.

Since this Court did not reverse on the basis of petitioner's first or third questions, it must have reversed on the basis of the second question, alone, namely that the negligent handling of proper equipment by long shoremen rendered the vessel operationally unseaworthy instantly.

The trial court in *Mascuilli* concluded as a matter of fact that the vessel was seaworthy at all times, and that the accident was caused solely by the negligent operation of the stevedoring crew using proper equipment improperly. The conclusion of law reached was that on the basis of the facts found there could be no recovery for complainant since the shipowner was not obliged to furnish an accident-free ship.

The Appellant Court in *per curiam* affirmed the decision of the trial court. Why then did this Court summarily reverse a conclusion of law of the two lower courts that negligent handling of proper equipment does not render the vessel unseaworthy?

This answer is to be found in *Mahnich* and *Crumady*. In *Crumady v. The J. H. Fisser*, 358 U.S. 423 (1959),

this court quoted approvingly from *Grillea v. United States* (2 Cir. 1956): 232 F.2d 919

> "It was held in Grillea v. U.S. . . . that stevedores themselves could render a ship *pro tanto* unseaworthy and make the vessel owner liable for injuries to one of them . . . *We need not go so far as to sustain the District Court here.*" (Emphasis added). (Id. at p. 427).

Just three weeks prior to its decision in *Mascuilli*, this court further clarified the language in *Crumady*:

> "And in Crumady . . . we further clarified the extent of unseaworthiness liability by holding that, even though the equipment furnished for the particular task is itself safe and sufficient, its misuse by the crew renders the vessel unseaworthy." *Waldron v. Moore-McCormack, Inc.*, 386 U.S. 724, (1967)

When *Mascuilli* was presented to this court, it simultaneously granted *certiorari* and reversed on the basis of what was already the law as stated in *Crumady*. *Mahnich* was cited for the proposition that the court could review the concurrent findings of seaworthiness by the two lower courts below, where such findings contained an erroneous conclusion of law. This court was obviously of the opinion that the misuse of proper equipment rendered the vessel unseaworthy as a matter of law, and the failure of the two courts below to so hold was reversible error.

Doctrinal trends of this Supreme Court since *Mahnich* 321 U.S. 96 (1944) have shown an ever increasing liberalization of the unseaworthiness doctrine.

The Supreme Court has guarded the doctrine of seaworthiness and has in each instance wherein an attempt has been devised to encroach upon it or limit its applicability tolerated no departure from the concept of a species of liability without fault imposing upon the shipowner an absolute, non-delegable duty to all who come within the range of the doctrine's humanitarian policy. A brief review of the pertinent jurisprudence aptly demonstrates this Court's position that it is a concept divorced of negligence, an absolute non-delegable duty, due when and where the work is to be done.

Mahnich v. Southern S.S. Co., 321 U.S. 96, 64 S. Ct. 455 (1944) Unseaworthiness exists even if sound gear and equipment were aboard and available, though not used.

Seas Shipping Co. v. Sieracki, 328 U.S. 85, 66 S. Ct. 872 (1946) The duty to provide a seaworthy vessel applies when the vessel is in port as well as at sea.

Sea Shipping Co. v. Sieracki, 328 U.S. 85, 66 S. Ct. 872 (1946)

Pope and Talbott v. Hawn, 346 U.S. 406, 73 S. Ct. 1129 (1953) The duty of providing a seaworthy vessel is owed to shoreside personnel doing work traditionally done by seaman — "substitute seaman".

Alaska Steamship Co. v. Pettersen, 347 U.S. 396, 74 S.Ct. 272 (1954) The duty is owed by the shipowner though control has been relinquished and ship's gear is not involved.

Boudoin v. Lykes Brothers S.S. Co., 348 U.S. 336, 75 S. Ct. 382 (1955) The doctrine is not solely limited to

structural or material features of the ship but extends and is applicable to personnel also.

Crumady v. The J. H. Fisser, 358 U.S. 423, 79 S. Ct. 445 (1959) The doctrine embraces improper use of seaworthy equipment.

Mitchell v. Trawler Racer, Inc., 362 U.S. 539, 80 S. Ct. 926 (1960) The doctrine embraces "transitory conditions".

Gutierrez v. Waterman S.S. Co., 373 U.S. 206, 83 S. Ct. 1185 (1962) The doctrine is applicable to shoreside injuries caused by the vessel's unseaworthiness as well as to injuries sustained aboard ship as a result of the vessel's unseaworthiness.

Reed v. The Yaka, 375 U.S. 872, 83 S. Ct. 1349, 429 (1963) The duty is owed to a longshoreman even if his employer is also the time charterer of the vessel.

Albanese v. Maats, 382 U.S. 283, 86 S. Ct. (1965) Actual knowledge of the dangerous condition is not required for liability for unseaworthiness to attach.

Jackson v. Lykes Brothers S.S. Co., 386 U.S. 731, 87 S. Ct. 1419 The duty is owed the longshoreman even if his employer is also the owner of the ship.

Waldron v. Moore-McCormack, 87 S. Ct. 1410, 386 U.S. 724 The duty is owed and the shipowner cannot escape liability because men rather than machines or physical equipment is used to perform ship's work.

The pertinent consideration has always been the exist-

ence of the unseaworthy condition, not the method of its creation.

Judge Hays in affirming recovery for the plaintiff in an alleged "operational negligence" case, *Skibinski v. Waterman Steamship Company*, 360 F 2d 539, 2 Cir. 1966 stated:

> "In defining unseaworthiness we are not concerned with the conduct or process by which fitness is changed to unfitness. Our focus is upon the resulting condition of the ship."

The condition which comes into play when unsafe procedures and methods are used by longshoremen while performing their duties with otherwise seaworthy equipment is unseaworthiness. The act of negligence which creates the condition, if it results in immediate injury, is no less unseaworthiness. The condition which results is an unsafe place in which to work or a situation wherein the vessel and its appurtenances are not reasonably safe for their intended use at the time and place where the work is to be done. The end result of a longshoreman lowering a boom, negligently striking a fellow worker and that of a boom collapsing because of some structural defect is the same at the site where the boom inflicts an injury — unseaworthiness and an unsafe place in which to work.

Virtually all cases of unseaworthiness other than those resulting from structural failure are cases in which operational negligence, though not instantaneous, has resulted in an unseaworthy condition.

Mahnich v. Southern S.S. Co., 321 U. S. 96 (1944) Use of improper rope when proper was available.

Crumady v. Joachim Hendrik Fisser, 358 U.S. 423 (1959)

> Rendering safe equipment unsafe and unseaworthy by the manner in which it was used.

The Circuits have had considerable difficulty in determining when operational negligence ends and unseaworthiness begins. The distinction is untenable — a distinction without a difference.

In *Radovich v. Cunard Steamship Co.*, 364 F. 2d 1949, 2 Cir. (1966) it was stated:

> "A position that is impossible to do so (differentiate between operational negligence and an unseaworthy condition) with fairness and reason, in fact poses the question whether the distinction should not be dispensed with altogether."

The blending of the two concepts into one was recently recognized by the United States Supreme Court through Mr. Justice White speaking for the minority in the 5-4 decision in *Waldron v. Moore-McCormack Lines, Inc.*

> "While it is true that unseaworthiness is legally independent of negligence . . . it cannot be denied that in many cases unseaworthiness and negligence overlap . . . *I think the claim of negligence was identical with the claim of unseaworthiness.*" (Emphasis added).

CONCLUSION

It is respectfully submitted that the distinction between operational negligence and unseaworthiness is a distinction without a difference. It is further submitted that this Honorable Court did, in *Mascuilli*, abolish the

defense of operational negligence for the reason that operational negligence at the moment of injury does render the vessel unseaworthy. For the foregoing reasons the judgment of the United States Court of Appeals for the Fifth Circuit remanding this matter for entry of Summary Judgment should be reversed.

Respectfully submitted,

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